In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-666

UNITED STATES OF AMERICA, APPELLANT

v.

GLAXO GROUP LIMITED, AND IMPERIAL CHEMICAL INDUSTRIES, LIMITED

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION TO MOTIONS TO AFFIRM OR DISMISS

1. Contrary to ICI's contention (ICI Motion, pp. 14-18),[1] this Court has jurisdiction of the patent validity aspects of the appeal under the Expediting Act.[2]

As we pointed out in the Jurisdictional Statement (see, *e.g.*, p. 15, n. 13), the two patents chal-

[1] The appellees' Motions to Affirm or Dismiss are referred to as "ICI Motion" and "Glaxo Motion," and the government's Jurisdictional Statement, as "J.S."

[2] The Expediting Act (15 U.S.C. 29) provides, in pertinent part: "In every civil action brought in any district court of the United States under any of said Acts [the antitrust laws], wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

lenged in this case were used to further the antitrust violations found by the court below. These patents were the basis both for the agreement between Glaxo and ICI, and for the license agreements between them and their American distributors, which contained the unlawful bulk sales restraints. The government claimed that ICI and Glaxo violated the Sherman Act because they granted licenses containing illegal restrictions, and that the underlying patents were invalid. Moreover, the patents made the unlawful restraints more effective, by reason of the fact that they covered processing the bulk form of the drug into usable form. The government's challenge to the validity of these patents is no less a fundamental part of the antitrust action than are the other issues that are subsidiary to the basic antitrust violation question (for example, questions pertaining to relief, such as the government's request for compulsory licensing and sales) and are necessary to a complete determination of the case.

ICI's arguments proceed from an erroneous premise. It asserts (ICI Motion, p. 15) that whether the government has standing to challenge the patents in the circumstances here "is not itself an antitrust issue, and was found by the Court below not to be related to any antitrust issue." But that is precisely the issue we are presenting for review in this Court, and on which we disagree with ICI as well as with the court below. This question, like the question whether a claim for relief is stated under the antitrust laws (see, *e.g.*, *United States* v. *First City National Bank*, 386 U.S. 361), is one over which this

Court has jurisdiction under the Expediting Act because it is an integral part of the validity of the district court's final judgment in the antitrust action.

Indeed, this Court accepted this proposition in *United States* v. *Gypsum Co.*, 333 U.S. 364. There, the Court directly reviewed a district court's refusal to permit the government to challenge the validity of a patent asserted to justify the alleged antitrust violations. The district court had held that the government "was without standing" (333 U.S. at 387) to do so. While jurisdiction to review this question under the Expediting Act was not expressly dealt with, the Court considered and decided it, even though the issue "need not be decided to dispose of this case * * *" (*ibid.*).

The "considerations of sound judicial administration" to which ICI refers (ICI Motion, p. 18) support rather than militate against direct review of the patent issue. ICI's position would require separate appeals to different courts of issues arising in, and an essential part of, a single antitrust proceeding. But Congress expressed the contrary intent in the Expediting Act, by specifying that all issues in the antitrust proceeding should be determined in one direct appeal to this Court.

2. Appellees misconceive the position of the government with respect to the relief decreed by the court below. We believe that the district court applied an erroneous standard in determining the relief necessary to remedy the antitrust violations found here. Though recognizing that compulsory licensing and selling are available remedies, the court refused

to order them because the government had not shown that appellees' licensing and selling practices were "inextricably intertwined" (J.S. App. E, p. 66) with their unlawful antitrust conduct. As we stated in the Jurisdictional Statement (p. 18), this is not the correct standard for deciding what relief is needed to open the market that was closed by appellees' antitrust violations. It is on this basis that we argue that the district court improperly exercised its powers and failed to order the "effective" relief required in this situation.

The standard employed by the district court would, in effect, require that the government make a definitive showing that the market would have been significantly more competitive than it is now, but for the illegal restraints imposed by appellees. Indeed, appellee Glaxo supports this argument by noting that the government did not present evidence to show this (see Glaxo Motion, p. 13, n. 7). But, as we set forth earlier (J.S., p. 18, n. 20), this has never been required before, and would impose an impossible burden of proof on the government. For here the illegal restraints have existed for a long period and reconstruction of what the market would have been without them would necessarily be based only on conjecture.

There is no dispute that appellees unlawfully restrained trade with the help of their patents, and that now there is essentially no competition in the market. The government showed that compulsory licensing and selling would pry open the market, and that without such relief the market would remain closed to competition. In these circumstances, it

follows that the existing market structure results in large measure from appellees' illegal conduct. We submit that on this record, effective relief requires the remedies sought by the government.

CONCLUSION

For the reasons stated above and in the Jurisdictional Statement, probable jurisdiction should be noted.

Respectfully submitted.

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